Supreme Court, U.S.
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No. 95-855

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GERALD D. BAIR, DIRECTOR,
IOWA DEPARTMENT OF REVENUE AND FINANCE,
Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent restates the Questions Presented as follows:

I. Whether the unanimous federal case authority has correctly decided that statutory schemes that single out rail transportation property and a few other disadvantaged taxpayers for personal property tax when other commercial and industrial personal property is not taxed violate Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976.

II. Whether the refusal of lower courts to impose a discriminatory burden of proof as the "applicable State law" is correct.

LIST OF PARTIES TO THIS PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner is the Director of the Department of Revenue and Finance of the State of Iowa (hereinafter referred to as the "Director" or "Petitioner").

The Respondent is The Burlington Northern Railroad Company (hereinafter referred to as "BN"), a wholly-owned subsidiary of Burlington Northern Inc., which in turn is wholly owned by the Burlington Northern Santa Fe Corporation.

The majority-owned subsidiaries of respondent Burlington Northern Railroad Company are:

Burlington Northern Dock Corporation
Burlington Northern (Manitoba) Limited
Burlington Northern Railroad Holdings, Inc.
Burlington Northern Worldwide, Inc.
Electro Northern, Inc.
Western Fruit Express Company
Winona Bridge Railway Company

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IOWA DEPARTMENT OF REVENUE AND FINANCE,
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v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinions below are adequately identified in the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISION INVOLVED

The statutory provisions involved are adequately stated in the Petition and Appendices I and J thereto.

COUNTERSTATEMENT OF THE CASE

Dissatisfied with the Petitioner's Statement of the Case, Burlington Northern Railroad Company (BN) hereby offers a counterstatement of the case.

The Petition omits any statement of the proceedings and issues decided below, and significantly misstates the facts concerning Iowa's property tax scheme in an attempt to reshape this case into conflict with this Court's decision in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 114 S.Ct. 843 (1994) (hereinafter referred to as "*ACF*").

In the district court, BN raised four claims that its 1989 Iowa assessment violated Section 306.[1] First, the Petitioner discriminated against BN in violation of Section 306(1)(a) by significantly overstating the value of BN's rail transportation property. Second, the Petitioner discriminated against BN in violation of Section 306(1)(a) by failing to equalize BN's assessment to the level of all other commercial and industrial real property in Iowa. Third, the Petitioner discriminated against BN in violation

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[1] Section 306 of the Railroad Revitalization and Regulatory Reform ("4-R") Act of 1976, Pub.L.No. 94-210, 90 Stat. 31, 54-55 (Feb. 5, 1976), codified at 49 U.S.C. § 11503. The language of Section 306 appears in Appendix I to the Petition. As did the Petition, this response shall reference the language of Section 306. *See* Pet., p.2.

of Section 306(1)(d) by taxing BN's intangible property although Iowa does not tax the intangible properties of any locally assessed[2] commercial and industrial taxpayers. Fourth, although the Petitioner had allowed BN a deduction for its tangible personal property, he discriminated against BN in violation of Section 306(1)(d) by treating certain of BN's personal property as real property in his calculation of BN's tangible personal property deduction.

Preliminary injunctive relief was entered by the district court, initially by consent, and later by ruling after a hearing. The issues on the merits were framed by a detailed pre-trial order, and the case was submitted to the district court upon an extensive record over 11 days of trial.

The district court found that the Petitioner had discriminated against BN by overvaluing its property and by including certain intangible property in BN's assessment. The district court denied all relief on BN's second and fourth claims. BN did not appeal the district court's denial of its second and fourth claims. The Petitioner appealed the district court's rulings on valuation and intangible property.

The case below was tried prior to *ACF*, and the trial did not address the theories now advanced by the Petition. The pre-trial order did not set forth the factual

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[2] Railroad property, unlike most property in Iowa, is "centrally assessed" by the Petitioner. Only a small number of utilities and railroads are centrally assessed by the Petitioner. All other property which is subject to ad valorem tax in Iowa is "locally assessed" by city and county assessors.

analysis now tendered by the Petitioner. Therefore, no fully-developed factual record exists in this case to support the type of analysis advanced by the Petition. Accordingly, the Respondent at the outset advises the Court, pursuant to Rule 15.2 of the Rules of the Supreme Court, that many of the "facts" stated in the Petition are either dehors the record or are unresolved factual disputes, and that the following points of "fact" and law would not be properly before the Court if certiorari were granted:

1. Contrary to the Petition's suggestions to the contrary (Pet., p.11), neither the district court nor the Eighth Circuit held in this case that Iowa could not assess BN's tangible personal property. Because the Director did not purport to tax BN's tangible personal property for the tax year at issue here, the lower courts were not required to make any rulings on the question whether BN's tangible personal property could be taxed. The lower courts' rulings were therefore limited to intangible personal property. To the extent that the Petitioner seeks review of issues of the taxation of BN's tangible personal property, the Petition improperly seeks review by certiorari of an issue never decided below.

2. The assertion in the Petition that non-railroad taxpayers who are taxed on personal property "are both more numerous than the railroads and pay significantly more in taxes than the railroads" (Pet., p.5) was not a factual

finding in the district court and was not an issue tried below.

3. The conclusion that Iowa taxes "the same proportions of real and personal property as Oregon" (Pet., p.5) was not a factual finding in the district court and is not readily discernible from this record.

4. The Petition's assertions concerning total assessed values of categories of property in Iowa (Pet., p.6) were not argued by the parties below nor analyzed by the district court, and were raised for the first time when the Petitioner sought a rehearing before the Eighth Circuit.[3]

5. As is apparent from the Petition's desperate request for the Court "to notice" certain "facts" concerning unit assessments of railroads (Pet., p.6), the record below does not support the contention that current railroad assessments do not differ from the value that railroads would have been assessed in 1989 if all of their property had been included in their 1989 assessments. (Pet., p.7).

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[3] Although the Petition's asserted statistical analysis purports to rely on a trial exhibit, this exhibit was not used at trial for the purposes now attempted by the Petition.

6. The Petition's conclusions concerning the proportion of taxes paid by railroads (Pet., p.7) are not based on any findings or analysis of either of the lower courts.

7. The Petition's assertion that "only" $2.7 billion in market value of personal property was removed from the rolls as of January 1, 1986 with the repeal of personal property taxes in Iowa (Pet., pp.7-8) is incorrect and misleading. The aggregate assessed value of tangible personal property was frozen as of January 1, 1973. *See* Section 427A.11, Iowa Code (1989).[4]

8. The Petition's conclusions concerning the application of an alleged "Seventh Circuit test" to the Iowa tax scheme (Pet., p.9) is purely speculative based on the record in this case. No such test was proffered or considered either by the district court or the original panel of the Eighth Circuit.

In short, this case does not provide this Court with a developed factual record to properly conduct the analysis urged by the Petition. Furthermore, what the record does reveal is considerably at odds with the descriptions in the Petition.

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[4] All references are the 1989 Iowa Code unless otherwise stated.

The Petition describes Iowa's property tax system as "highly integrated" -- a description the Petition fails to define. According to the Petition, Iowa supposedly imposes a "unified tax" on a "single taxable class of property." (Pet., p.5.) The Petition continues its sophistry by stating that this single class of property contains both real and personal property. This description completely overlooks the total picture of the Iowa property tax system. The Petition's tortuous characterization of Iowa's law was rejected by the Eighth Circuit and is rebutted by the clear language of the statutes of Iowa, as well as the substantial record below.

Iowa imposes a property tax only on "real property" as defined in Section 427A.1, Iowa Code. Taxes on tangible personal property were repealed as of 1986 after a period of phase-out. *See* Acts of the 71st Iowa General Assembly, 1985 Session, Ch. 32, § 105. As the district court found, intangibles are likewise not generally subject to tax. *See* App., pp. 48a-49a.[5] Thus, Iowa does not generally tax personal property.[6]

This general statement must, however, be qualified because "real property" as peculiarly defined by Iowa statute includes not only land, buildings, and fixtures as defined in Section 427A.1, Iowa Code, but also two kinds of tangible personal property - computers and manufacturing machinery and equipment. These categories are arbitrarily defined to be "real property" for

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[5] References are to the Appendix to the Petition.

[6] Owners of motor vehicles pay an ad valorem tax at the time of registration of the vehicle. BN pays this tax in the same way as all other vehicle owners in Iowa.

purposes of taxation. These limited classes of tangible personal properties are not, however, fully taxed. Unlike actual real property, which is required to be assessed at 100% of market value, the assessment of computers and manufacturing machinery and equipment is limited to 30% of net acquisition cost. Therefore, such categories of property are not assessed at full market value as is generally required for railroads and for Iowa's real property. *Compare* Section 425B.17 *with* Section 441.21, Iowa Code.[7]

In contrast to the general non-taxation of personal property, Section 427A.1(1)(h), Iowa Code, classifies all of the property of centrally assessed taxpayers, including railroads, as "real property." *See* footnote 2, *supra.*

The effect of the statutes is that railroads are singled out by statute as a part of a small group of taxpayers to pay tax on all of their tangible and intangible personal property in Iowa.

The Petition attempts to obfuscate the obvious fact of discrimination against BN by referring to obscure and obsolete portions of the Iowa statutes, such as provisions concerning "ferry franchises," lessee's interest in state lands, and "rights to space above land." The record below does not discuss these types of properties at all, and does

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[7] In addition, Iowa has scheduled a "phase-out" of the property tax on computers and industrial machinery and equipment, prompted by legislation excluding such property from tax if first assessed on or after January 1, 1995. *See* Acts of the 76th Iowa General Assembly, 1995 Session, Ch. 206, § 29; Rule 80.7, 701 Iowa Administrative Code, Iowa Dept. of Revenue and Finance, adopted Oct. 20, 1995, Vol. XVIII, No. 10, Iowa Administrative Bulletin 789-790.

not specifically show whether there are "ferry franchises" actually taxed in Iowa.[8]

The Director makes much of Iowa's continued partial taxation of motor vehicles, computers, and manufacturing machinery, but he ignores the fact that BN's Section 306 relief accommodates such taxation. Equality is maintained because Burlington Northern is taxed on its motor vehicles just like locally assessed owners. *See* footnote No. 6, supra. No personal property deduction is allowed for BN's computers.[9] Burlington Northern does not happen to own manufacturing machinery, so that category does not impact BN.

Therefore, despite the Petition's creative efforts to recast the Iowa real property tax into something it is not, the fact remains that no commercial and industrial intangible personal property is taxed except the intangible personal property of railroads and a few other utility taxpayers. Furthermore, BN continues to pay tax on the limited types of personal property (such as motor vehicles and computers) which it owns and which are still subject to tax in Iowa.

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[8] There is, of course, a specific finding that intangibles were not taxed in Iowa. *See* App., pp. 48a-49a.

[9] As part of the Director's assessment of BN for 1989, he deducted the value of BN's tangible personal property by allocating the total assessed value between real and tangible personal property on the basis of the ratio of the net book value. BN's computers were treated as "real property" in this ratio, and thus the value of BN's computers was not deducted from its assessment.

REASONS FOR DENYING THE WRIT

The Petition does not present sufficient grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. BN respectfully submits that the Petition should be denied for the following reasons.

I. NO GROUNDS EXIST TO REVIEW THE EIGHTH CIRCUIT'S RULING CONCERNING THE DISCRIMINATORY TAXATION OF BN'S INTANGIBLE PERSONAL PROPERTY.

A. There is No Conflict in the Circuits.

The Petition incorrectly asserts that a conflict exists between the decision below and this Court's decision in *ACF* and the Seventh Circuit's decision in *Burlington Northern Railroad Company v. Wisconsin Department of Revenue*, 59 F.3d 55 (7th Cir. 1995).

There is no conflict because the property tax systems in Oregon and Wisconsin are quite different from that in Iowa. Stated simply, the results in the cases are different because the facts are different.

In *ACF* the Supreme Court considered a generally applicable personal property tax with specific exemptions carved out. The Seventh Circuit considered Wisconsin's tax system, and despite the railroads' claim to the contrary, found it to be indistinguishable from Oregon's.

The Eighth Circuit, in view of Iowa's general repeal of personal property taxes and the district court's specific

finding that intangible assets were not taxed, distinguished Iowa's tax scheme from Oregon's. It stated:

> We conclude that Iowa's tax scheme fits within the narrow exception left open by the Supreme Court in *ACF*. Here, we believe Iowa has singled out for taxation all the personal property of railroads and a handful of interstate utilities, while leaving untaxed most of the personal property of every kind, and all the intangible personal property, of the vast majority of commercial and industrial enterprises in the state. The Supreme Court refrained specifically, in *ACF*, from deciding whether [Section 306(1)(d)] would apply in such a case.

(Pet., p.8a.)

There is nothing in this rationale that conflicts with *ACF* or the Seventh Circuit's decision. Indeed, all of these cases apply the same principles. The differences in results emerge from differences in the tax systems considered.

In order to construct a perceived conflict, the Petition necessarily fails to discuss the rationale first enunciated by the Eighth Circuit -- and left undisturbed by this Court's ruling in *ACF* -- in *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981) and *Burlington Northern Railroad Company v. Bair*, 766 F.2d 1222 (8th Cir. 1985) ("Bair I").

In *Ogilvie*, the Eighth Circuit affirmed an injunction prohibiting the taxation of railroad personal property in

North Dakota because non-utility commercial and industrial taxpayers did not pay tax on personal property. The Eighth Circuit established the common-sense principle that the "most obvious form" of discrimination was to tax a class of railroad property which was not taxed to other commercial and industrial taxpayers. *See* 657 F.2d at 210.

In *Bair I*, the Eighth Circuit ruled that BN's personal property was entitled to the same "roll-back" of personal property valuation and application of credits against value as was then afforded to locally assessed taxpayers in Iowa as part of the phase-out of personal property taxes which was in progress at that time. Iowa's special statutory treatment of railroad personal property as "real property" was held not to preclude treating railroad personal property like other personal property. *Bair I* thus established that Iowa could not discriminate by classifying railroad property for separate adverse treatment and that railroad property should be treated like locally assessed personal property. When Iowa subsequently completed the phase-out and enacted a repealer of its tangible personal property tax, the Petitioner followed the direction of *Bair I* and ceased taxing railroad tangible personal property altogether.

The equality of treatment mandated by *Ogilvie* and *Bair* has simply been carried forward in this case by exclusion of BN's intangible assets from tax in view of the fact, proven at trial, that intangible assets are not taxed in Iowa.

The Petition indulges in a purported statistical analysis -- not presented to the district court or the original panel of the Eighth Circuit -- comparing railroad

assessments and taxes to aggregate assessments and taxes of other types of property. The Petition's statistical analysis is a transparent attempt to construct a conflict between the Eighth Circuit and the Seventh Circuit's decision in *Burlington Northern Railroad Company v. Wisconsin Department of Revenue, supra*. Because of the very different facts considered by the Seventh Circuit, the effort by the Petitioner to create the conflict fails at the threshold.

Wisconsin, unlike Iowa, but like Oregon, imposes a tax on all property, including personal property, but exempts specifically enumerated kinds of personal property. The Seventh Circuit cited statistics comparing railroad taxes to all other taxes solely to help resolve whether the actual tax levy was "a general tax in name only." *See* 59 F.3d at 58. No such inquiry is necessary here because there can be no claim that Iowa imposes a general personal property tax on tangibles or intangibles. In fact, the Seventh Circuit itself specifically distinguished *Ogilvie* -- and by necessary implication, *Bair I* and this case -- by comparing Wisconsin's "universal" tax to a tax which singles out centrally assessed taxpayers. *See* 59 F.3d at 55, n.1. Thus, the Seventh Circuit acknowledged the distinction drawn by the Eighth Circuit here that *ACF* does not spare discriminatory property taxation where railroads are targeted for a tax not generally applicable to other taxpayers.

It is certainly not clear that the analysis employed by the Seventh Circuit was compelled by this Court's decision in *ACF*, or is even an appropriate analysis to use in states like Wisconsin. For purposes of deciding whether certiorari is appropriate in this case, however, it is enough to say that the Eighth Circuit and the Seventh

Circuit are not in conflict, and nothing the Seventh Circuit said in its decision constructs a conflict between the Eighth Circuit and the Seventh Circuit, or a conflict between either of those courts' decisions and this Court's decision in *ACF*.

The Petition additionally asserts "divergent results" among the district courts following this Court's decision in *ACF* concerning the issue of what constitutes a "generally applicable tax." (Pet., p.12.) This assertion is surprising because the district court decisions cited uniformly found discrimination where railroads were singled out for discriminatory taxation, employing an unusual uniformity of logic and evincing a studied adherence to this Court's ruling in *ACF*.[10]

The case law since this Court's decision in *ACF* is also unanimous in holding that the existence of other victims of discrimination -- usually other utility taxpayers -- does not render the challenged tax "generally applicable." *See, e.g., Ogilvie v. State Board of Equalization*, 893 F.Supp. 882 (D.N.D. 1995); *Burlington Northern Railroad Company v. Huddleston*, Civ. No. 95-8-472 (D.Colo., filed June 30, 1995) (appeal pending) (App. M., p. 123a); *Burlington*

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[10] The extent to which the Petition strains to create a conflict where none exists is exemplified by its discussion of Oregon's exemption for agricultural products. *See* Pet., p.25. The Petition claims that this Court in *ACF* held that no violation of Section 306(1)(d) can result where railroad property is taxed when it would be exempt if owned by a different taxpayer. That issue was not raised, much less decided by the Court in *ACF*. There was no allegation or proof that the plaintiff carlines in *ACF* owned any agricultural products subject to Oregon's exemption. Thus there was no allegation or proof that the exemption was discriminatorily denied to the carlines in *ACF*.

Northern Railroad Co. v. South Dakota Dept. of Revenue, No. 94-3073 (D.S.D., filed June 26, 1995) (App. N., p. 132a). These decisions are totally consistent with each other and with this Court's statement in *ACF* to refrain from deciding the effect of a tax imposed only on railroads "as part of some isolated and targeted group." *See ACF*, 114 S.Ct. at 851. A substantial and unanimous body of case law had dealt with states where railroads were treated as a utility for tax purposes. This class of utility taxpayers, sometimes referred to as centrally assessed taxpayers, has been considered an isolated and targeted group. Both before and after *ACF*, the lower courts have unanimously rejected the defense that railroads may be discriminated against because other utilities are likewise victims of discrimination. *See, e.g., Ogilvie v. State Board of Equalization*, 492 F. Supp. 446, 455 (D.N.D. 1980), *aff'd*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); *Bair, supra*, 766 F.2d at 1224; *Kansas City Southern Railway Co. v. McNamara*, 817 F.2d 368 (5th Cir. 1987) (tax on utilities including railroads), *Alabama Great Southern R.Co. v. Eagerton*, 541 F. Supp. 1084, 1087-88 (M.D. Ala. 1982) (license tax imposed on railroads which is higher than license tax on most other commercial and industrial businesses is not permissible despite high license taxes on other utilities); *State of Arizona v. Atchison, Topeka & Santa Fe R.R. Co.*, 656 F.2d 398, 400, 403-04 (9th Cir. 1981) (rejecting argument that railroads may be assessed at the highest assessment classification because airlines, carlines, various mine property, and standing timber is also assessed at highest ratio); *Louisville & Nashville R.R. Co. v. Louisiana Tax Commission*, 498 F. Supp. 418, 421-22 (M.D. La. 1980) (rejecting defense of a discriminatory assessment ratio against railroad property because 231 non-railroads also were discriminated against).

Certainly nothing in the Seventh Circuit's decision breaks this unanimity. In fact, the Seventh Circuit took pains to point out that the application of the Wisconsin tax did not depend on "whether the business which owns the property is locally or centrally assessed." *See* 59 F.3d at 57, n.1. In Iowa, only the intangible assets of centrally assessed taxpayers are taxed. According to unanimous case law, such a tax is prohibited by Section 306(1)(d).

The other issues addressed by the Eighth Circuit on the intangible claim likewise present no question in which any of the lower courts are in conflict. For example, the Petition faults the Eighth Circuit for considering only personal property, and not considering Iowa's taxation of commercial and industrial real property. The Eighth Circuit's analysis, however, is wholly consistent with the extensive and unanimous case precedent -- again left undisturbed in *ACF* -- which holds that real and personal property should be analyzed separately under Section 306 when so treated by the tax system being considered. *See, e.g., Bair, supra*, 766 F.2d at 1225; *ABF Freight System, Inc. v. Tax Division of the Arkansas Public Service Commission*, 787 F.2d 292 (8th Cir. 1986); *Clinchfield Railroad Company v. Lynch*, 700 F.2d 126, 129, n.2 (4th Cir. 1983); *Arkansas-Best Freight System, Inc. v. Lynch*, 723 F.2d 365 (4th Cir. 1983). Nothing in *ACF* overrules this sound precedent, and the Seventh Circuit found it unnecessary to decide the question. *See* 59 F.3d at 58. *ACF* certainly did not hold that the question of "general applicability" must be made in reference to a combination of real and personal property, where real and personal property are treated differently under state law. Rather, *ACF* simply analyzed the case that way based on the Oregon statutes.

The Petition incorrectly cites *Atchison, Topeka and Santa Fe Railway Co. v. Lennen*, 732 F.2d 1495 (10th Cir. 1984) for the proposition that the "general applicability" determination must be made under some kind of aggregation of real and personal property in the comparison class. To the contrary, *Lennen* is consistent with the view of the Eighth and Fourth Circuits holding that real property and personal property must be addressed separately where they are assessed differently by state law. The language cited from *Lennen* in the Petition actually rejected the railroad's argument that it should be automatically entitled to relief for personal property discrimination where it shows discrimination as to real property. *See* 732 F.2d at 1501-03.

No conflict among the circuits has developed in the wake of this Court's decision in *ACF*.

B. No Compelling Reason Exists for Granting the Writ.

In addition to the fact that no conflict exists on Petitioner's first issue, no compelling reason exists for granting the writ on that issue. The Petitioner simply seeks to reargue its case once again. Its argument that the Eighth Circuit's decision is wrong simply does not justify review by the Court at this time. Rule 10 clearly provides that an alleged erroneous factual finding or misapplication of a properly stated rule of law does not justify review on a writ of certiorari.

The Petition's insistence that "timely guidance" is needed by the lower courts is incorrect and exaggerated. All courts since this Court's decision in *ACF* have carefully read and applied *ACF*, with remarkably consistent results.

Aside from alleging conflict among the Circuits, the petitioner argues that the Eighth Circuit's decision is contrary to Section 306 and *ACF*. Assuming arguendo that such considerations compel certiorari, the Petition is simply incorrect on both scores.

The Petition challenges the Eighth Circuit's decision for considering untaxed personal property at all, relying on the alleged "plain language mandate" in Section 306(3)(c) defining "commercial and industrial property" as property "subject to a property tax levy."[11] This language is totally irrelevant to the issue here. In *ACF*, this Court discussed whether property was "subject to a property tax levy" only to support a text-based inference that Congress made a choice to allow partial exemptions from a generally applicable tax without subjecting railroad taxes to scrutiny. *See* 114 S.Ct. at 848-49. *ACF* clearly did not rule that courts should determine the generally applicability of taxes by ignoring untaxed property, nor has any lower court so held.[12] *ACF* did not say, as

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[11] As part of its statutory construction argument, the Petition cites an isolated and obscure statement in the legislative history of Section 306, purportedly supporting its mysterious conclusion that "Congress was made aware of the distinction between legislative action and assessing failure as modes which removed property from the rolls." *See* Pet., p.24. Aside from the fact that the quoted legislative history adds nothing to the issues under consideration, this Court has previously cautioned that the language of Section 306, and not its legislative history, is the best guide to Congressional intent. *See Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987); *ACF*, *supra*, 114 S.Ct. at 851.

[12] The Petition's reliance on Section 306(2)(e) to support its "textual analysis" (Pet., p.23) is wholly misplaced. Section 306(2)(e) applies solely to claims under Section 306(1)(a) where the plaintiffs are relying on a sales assessment ratio study to prove discrimination.

suggested by the Petition, that the "comparison class" for claims under Section 306(1)(a) is also the "comparison class" for claims under Section 306(1)(d). Carried to its ultimate conclusion, such an argument would be inconsistent with *ACF*'s explicit reservation that where railroads are singled out for discriminatory treatment, a violation of Section 306(1)(d) may still occur. *See* 114 S.Ct. at 851. It would also render Section 306(1)(d) completely meaningless, which is a result to be avoided in construing statutes. *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

As has already been pointed out earlier in this Response, this record does not contain the necessary findings of fact and development of assessment and tax data to allow the type of analysis urged by the Petition. In addition, Iowa's property tax system is again in a state of flux in view of the pending phase-out of taxes on all remaining non-utility personal property. *See* footnote 7, *supra*. If in fact the lower courts need guidance in judging whether a challenged tax is generally applicable, this Court should instruct the lower courts only when provided with an adequate factual record in a future case.

The Petition's attempt to invoke principles of federalism as grounds for reviewing this decision is a desperate attempt to trivialize federalism by invoking it as a call to reverse any federal court decision voiding a state tax practice. The role of federalism under Section 306 has been established by this Court's decisions in *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481

That section has nothing to do with exempt property or the issues in this case.

U.S. 454 (1987) and *ACF*. Where the language of Section 306 "plainly declares the congressional purpose," the federal courts are not free to weigh the considerations of federal interference. *See Oklahoma Tax Commission, supra,* 481 U.S. at 461, 464. Pre-emption displaces state law where the clear and manifest purpose of Congress so provides. *See ACF, supra,* 114 S.Ct. at 851. As the lower courts have correctly held, a tax which singles out railroads for a discriminatory tax clearly violates Congress' clear and manifest prohibition in Section 306(1)(d) of "any other tax which results in discriminatory treatment" of a railroad.

Finally, no compelling reason exists to review this case on the ground that the holding is grossly in error. To the contrary, the result of Section 306 relief in Iowa has been to give Burlington Northern equal treatment under Iowa's specific tax system -- no more and no less. The Petition does not attempt to dispute this equality. Rather, the Petition argues that Section 306 no longer requires equal treatment between railroad property and other commercial and industrial property because of *ACF*. The Eighth Circuit correctly rejected this argument, concluding that BN's challenge to Iowa's taxation of BN's intangible assets did not present issues of "exemption" discrimination at all, and thus *ACF*'s holding was inapposite. The Petitioner's arguments presented here that a failure to tax non-railroad personal property is the equivalent of granting exemptions from an otherwise generally applicable tax was considered by the Eighth Circuit and correctly determined to be "specious" in light of the uncontrovertible fact that Iowa had repealed its tax on personal property. The Petitioner, in the face of Iowa's statutory language, argued that because all "exempt" property is "untaxed," that, conversely, "untaxed" property

must be "exempt." The Eighth Circuit below considered this argument and correctly rejected it.

Because this is not an exemption case, the Eighth Circuit had no occasion to apply this Court's exemption holdings in *ACF*. Nevertheless, the Eighth Circuit addressed the issue whether Iowa's tax on railroad intangibles is a generally applicable tax or is instead a tax which singles out railroads for discrimination in view of *ACF*'s overall rationale. Its conclusion that *ACF* does not countenance the taxation of railroad intangible personal property in Iowa was clearly correct.

Now, for the first time, the Petitioner attempts to paint a new face on its argument by claiming that the "removal" of all personal property from the tax base is the equivalent of granting specific exemptions from a generally applicable personal property tax. These purely semantical tactics are as "specious" as the arguments made to the Eighth Circuit, and in any event should not be considered initially on certiorari. Whatever merit may lay in the Petitioner's distinctions should be reviewed by this Court only after consideration by, and conflict among, the lower courts.

Therefore, no compelling reason exists to grant certiorari on the Petitioner's first issue.

II. NO GROUNDS EXIST TO REVIEW THE EIGHTH CIRCUIT'S RULING CONCERNING THE BURDEN OF PROOF.

A. No Conflict Among the Circuits is Presented by the Record Here.

The Petition attempts to assert a conflict on the burden of proof applicable in valuation cases under Section 306(1)(a). There has been some inconsistency, but no conflict is presented by the record in this case.

The Eighth Circuit and the Tenth Circuit have correctly held that the burden of proof applicable to determinations of valuation under Section 306(1)(a) is governed by state law, and is the state law burden of proof "generally applicable to civil proceedings" (Pet. 9a.) *See also Bair I, supra*, 766 F.2d at 1226; *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 732 F.2d 1495, 1500 n.4 (10th Cir. 1984). State law is required to be applied by Section 306(2)(d) ("the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State Law").

The Petitioner urges that a different state law burden should be applied and cites *Burlington Northern R. Co. v. Department of Revenue, State of Washington*, 23 F.3d 239 (9th Cir. 1994) (hereinafter "Washington") for the proposition that the correct rule is "the burden that would be applied in an ad valorem property tax trial under state law." (Pet., pp.12-13) More specifically, the Petitioner urged below that a "clear and convincing evidence" burden of proof applies in an Iowa case because that is the test which he claims is to be applied in Iowa to appeals of

central assessments of railroads and other utilities. (Pet., 9a.) In *Washington*, the Ninth Circuit applied the burden of proof applicable to taxpayers generally in a property tax case. Here, the Petitioner argues for a special burden of proof he claims is applicable in appeals by utilities and railroads in state court.

Although the cited Ninth Circuit ruling may diverge from the standard applied by the Eighth Circuit and the Tenth Circuit, this case does not present a sharply defined conflict worthy of consideration by certiorari for several reasons.

First, although the Ninth Circuit, unlike the Eighth and Tenth, has not applied the general state law burden of a civil case to Section 306, the Ninth Circuit does not clearly articulate a test or a rationale for a test. Rather, the court resolved the case before it by referring to a state statute which was generally applicable to court review of property tax assessments (RCW 84.40.0301(1)). No reference was made to any other case law, or to any other contrary circuit view. Any conflict with other circuits must therefore be deduced from the result, and is not made explicit by a clearly articulated rationale.

Second, the result in this case would not change even if a Ninth Circuit-style analysis is applied. This is because Iowa, unlike Washington,[13] applies a burden of

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[13] At the time of the Ninth Circuit decision, all property tax cases in Washington, regardless of the taxpayer, were decided with a presumption of validity of the assessment under a "clear, cogent and convincing" standard. This state law has since been called into question by the Washington Supreme Court. *See* discussion at pp. 25-26, *infra*.

proof on taxpayers in property tax cases which is the same as the burden in a general civil case. *See* Section 441.39, Iowa Code; *Bartlett & Company Grain v. Board of Review*, 253 N.W.2d 86, 88 (Iowa 1977) ("Taxpayers initially have the burden of persuasion by preponderance of the evidence.") Indeed, in *Bair I*, the Eighth Circuit referred both to the Tenth Circuit test, and the Iowa law governing taxpayer appeals. *See* 766 F.2d at 1226. Thus, the facts of this case do not present a situation in which the results in the Ninth Circuit and the Eighth Circuit would differ.

Third, no court has ever applied a burden of proof derived from the limited remedies available to centrally assessed utilities and railroads, such as the Petitioner argues in this case. On two separate occasions, the Eighth Circuit has rejected the Petitioner's specific argument that a "clear and convincing" standard, such is claimed to be utilized in Iowa in a narrow range of cases dealing only with centrally assessed taxpayers, should be used. (Pet., p.9.) *See also Bair I*, 766 F.2d at 1226). The Ninth Circuit certainly did not apply the discriminatory test which is urged by the Petitioner here.

Thus, although the result in the Ninth Circuit in one case varied from the Tenth and Eighth Circuit standard, a well defined conflict situation is not created by the record in this case and any appearance of a conflict is illusory.

The Court will not be presented with an actual conflict on the issue presented by the Petition until some Circuit other than the Eighth Circuit must choose between the burden of proof applied to locally assessed taxpayers and a more stringent burden on centrally assessed

taxpayers, and chooses the latter in conflict with *Bair*. So far, this conflict has not arisen.

B. No Compelling Reason Exists to Review the Burden of Proof Issue.

The Petition argues that holding that the "applicable" burden of proof coincides with the general civil burden of proof renders Congress' use of the word "applicable" as superfluous because lack of Congressional action "would have incorporated the identical federal general civil burden of proof -- a preponderance of the evidence." *See* Pet., p.26. The Petition cites no authority for this assertion, and as a matter of federal jurisprudence, it is incorrect.[14] Lack of Congressional language would have left the federal district courts the leeway to develop an approach insensitive to state procedures, a result which Congress may well have rejected. A specific federal statutory direction to incorporate state law on the burden of proof cannot be deemed trivial, even if it results in adoption of the commonly applicable preponderance standard.

Review of the "burden of proof" issue would also be unwarranted here due to the fact that the state statute involved in the Ninth Circuit case has now been interpreted by the Washington Supreme Court to impose

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[14] The allocation of the burden of proof can be a complicated decision rooted in considerations of substantive law and non-evidentiary doctrines. *See* 21 Wright & Graham, *Federal Practice and Procedure*, § 5122, pp. 555-56 (1977). Therefore, the Petitioner's glib assumption that the burden of proof automatically defaults to a preponderance of the evidence standard in the absence of Congressional direction is erroneous.

only a preponderance of the evidence burden on all taxpayers, including centrally assessed taxpayers, in certain situations. *See Weyerhaeuser Company v. Easter*, 126 Wash. 2d 370, 894 P.2d 1290 (1995). In addition, Iowa has arguably repealed the "clear and convincing" burden of proof on centrally-assessed taxpayers, thereby alleviating any discriminatory burden of proof rules in Iowa. *See* Chapter 429, Iowa Code (1995). Suffice it to say at this point that both Washington and Iowa law are in a state of flux at this time. This Court should be reluctant to review a case where changes in state law may moot similar controversies in the future. *See, e.g, Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

Therefore, no compelling reason exists to review the burden of proof issue.

CONCLUSION

Although Section 306 is important legislation, the issues raised in this case do not warrant review by this Court. The lower courts all have consistently applied *ACF* and no conflicts have appeared. The Petition does not present any ground for granting certiorari within the meaning of Rule 10 of this Court and should be denied.

Respectfully submitted,

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